INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	6
Conclusion	13
Appendix A	1A
Appendix B	25A
Appendix C	26A
Appendix D	42A

CITATIONS

Cases:

American Mail Line Ltd. v. *Gulick*, 411 F. 2d 696	10
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402	12
Environmental Protection Agency v. *Mink*, 410 U.S. 73	7
International Paper Co. v. *Federal Power Commission*, 438 F. 2d 1349	11
Kaiser Aluminum & Chemical Corp. v. *United States*, 157 F. Supp. 939	8
Lichter v. *United States*, 334 U.S. 742	12
Renegotiation Board v. *Bannercraft Co.*, No. 72–822 decided February 19, 1974	12
Sterling Drug v. *Federal Trade Commission*, 450 F. 2d 698	7, 11
Washington Research Project, Inc. v. *Health, Education and Welfare*, 366 F. Supp. 929	9

532-812 74——1

Statutes and regulations:

	Page
Freedom of Information Act, as amended:	
5 U.S.C. 552	2
5 U.S.C. 552(a)(2)	5, 6, 9
5 U.S.C. 552(b)(5)	5
5 U.S.C. 557	12
Renegotiation Act of 1951, 65 Stat. 23, *et seq.*, as amended, 50 U.S. App. 1191, *et seq.*:	
50 U.S.C. App. 1211	2
50 U.S.C. App. 1215(a)	12, 13
50 U.S.C. App. 1215(c)	3
50 U.S.C. App. 1217(a)	2
50 U.S.C. App. 1217(d)	4
50 U.S.C. App. 1217(e)	3
50 U.S.C. App. (Supp. I) 1218	12
50 U.S.C. App. 1221	12, 13
32 C.F.R. 1422.232–2	4, 8
32 C.F.R. 1422.252–2	4
32 C.F.R. 1422.272–2	4
32 C.F.R. 1451.32	4
32 C.F.R. 1473	3
32 C.F.R. 1477.3	4

In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

THE RENEGOTIATION BOARD, PETITIONER

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Renegotiation Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–24A) is reported at 482 F.2d 710.[1] The opinion of the district court (App. C, *infra*, pp. 26A–41A) is reported at 325 F. Supp. 1146.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 1973 (App. A, *infra*, p. 1A). The Board's

[1] This opinion was rendered upon appeal by the Renegotiation Board from the decision of the district court after a previous remand by the court of appeals. The first opinion of the court of appeals remanding the case to the district court is reported at 425 F.2d 578.

timely petition for a rehearing en banc was denied on September 27, 1973 (App. B, *infra*, p. 25A). On January 17, 1974, the Chief Justice extended the time for filing a petition for a writ of certiorari to February 25, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fredom of Information Act requires the disclosure of recommendations concerning the disposition of pending cases made to the members of the agency, where the agency follows the recommendations but does not issue any opinions explaining its decisions.

STATUTE INVOLVED

The Freedom of Information Act ("FOI Act"), as amended, 5 U.S.C. 552, is reprinted at Appendix D, *infra*, pp. 42A–45A.

STATEMENT

Plaintiff instituted this suit pursuant to the Freedom of Information Act, 5 U.S.C. 552, seeking to compel the Renegotiation Board[2] ("the Board") to disclose certain documents.[3]

[2] The Renegotiation Board is "an independent establishment in the executive branch of the Government," composed of five members appointed by the President, with the consent of the Senate (50 U.S.C. App. 1217(a)). The Board is charged with the responsibility of effectuating the Congressional finding that "sound execution of the national defense program requires the elimination of excessive profits from contracts made with the United States, and from related subcontracts" (50 U.S.C. App. 1211).

[3] Grumman originally sought final orders and opinions of the Board relating to fourteen contractors and documents from

Two general types of documents are at issue here: (1) reports prepared by divisions[4] of the Board accompanying recommendations that the full Board grant a "clearance"[5] to a government contractor or determine that he earned excessive profits; (2) reports prepared by the regional subordinate subdivi-

Grumman's own renegotiation file. With respect to the final orders and opinions, the court of appeals in the first appeal in this case held that these decisions, after deletion of identifying details, were subject to public disclosure pursuant to the FOI Act and remanded the case to allow Grumman access to the documents after suitable deletions. 425 F. 2d 578.

Upon remand, the Renegotiation Board furnished the requested documents from Grumman's own renegotiation file as well as the final orders relating to the fourteen contractors. In addition, pursuant to a change in its regulations, the Board furnished Grumman with any "Summaries of Facts and Reasons" and "Statements of Facts and Reasons" issued in the case (App. C, *infra*, p. 27A). Grumman contended, however, that there were other documents in the Board's files relating to the fourteen cases which constituted final opinions within the meaning of the court of appeals' decision and moved for production of these documents. The district court interpreted "final opinions" as used by the court of appeals to include the documents at issue here. The present appeal by the Renegotiation Board from that decision of the district court followed.

[4] The Renegotiation Act of 1951, specifically authorizes the Board to establish divisions (50 U.S.C. App. 1217(e)). These divisions are composed of three of the five members of the Board, who are assigned the task in certain cases of preparing reports and recommendations prior to the issuance of a decision by the full Board (J. App. 29).

[5] The issuance of a clearance follows a Board determination that the contractor has not realized excessive profits. 32 C.F.R. Part 1473. The Board is not required to issue clearances, but without them, the contractor would be required to wait for the expiration of the statutory period of limitations contained in the Renegotiation Act before he could be assured that, in the Board's opinion, he had not earned excessive profits. See 50 U.S.C. App. 1215(c).

sions of the Board ("regional boards")[6] accompanying recommendations that the Board grant a clearance to a particular contractor. All of the reports concern Class A cases, *i.e.* those in which the Board retains sole decisional authority.[7] In all cases, the decision of the Board was in accord with the recommendation accompanying the report. All of the reports involve cases in which the contractor concerned did not request either a "Summary of Facts and Reasons"[8] or a "Statement of Facts and Reasons."[9]

[6] The Board is specifically authorized to delegate its functions to any government agency, including an agency which it creates (50 U.S.C. App. 1217(d)). The Board has exercised this authority by creating the Regional Renegotiation Boards. See 32 C.F.R. 1451.32.

[7] 32 C.F.R. 1422.232–2. Class A cases are those in which the contractor reports profits of more than $400,000. A Class B case is one in which a contractor has reported profits of less than $400,000. The Board has delegated authority to the regional board to make a final determination of excessive profits or to issue a clearance in Class B cases. 32 C.F.R. 1422.232–2; 1422.252–2. Determinations of excessive profits in Class B cases are subject to review by the Board. 32 C.F.R. 1422.272–2.

[8] A "Summary of Facts and Reasons" is issued, upon request of the contractor concerned, by a regional board when it has made a final recommendation in a Class A case or by the Board when it has made a final determination of the existence of excessive profits. The "summary" is issued before an order determining the existence of excessive profits has been issued in order to assist the contractor in determining whether or not it will enter into an agreement with the regional board or the Board. 32 C.F.R. 1477.3. "Summaries of Facts and Reasons" are prepared anew by staff personnel and are not simply summaries of various memoranda in the files.

[9] A "Statement of Facts and Reason" is similar to a "Summary of Facts and Reason" but is furnished to the contractor concerned upon request after, rather than before, an order finding the existence of excessive profits is issued. 32 C.F.R. 1477.2.

The district court rejected the Board's contention that the reports constituted intra- or inter-agency memoranda within the meaning of exemption 5 [10] of the FOI Act, 5 U.S.C. 552(b)(5), and were therefore exempt from compelled disclosure. Instead, the court held that both types of reports were final Board opinions issued in the adjudication of cases within the meaning of the FOI Act, 5 U.S.C. 552(a)(2)(A),[11] and that, therefore, their disclosure was required (App. C, *infra*, pp. 37A–41A).

With respect to the reports prepared by a division of the Board, the court held that "at the very least [the report] reflects the analysis of one member [of the Board] and * * * thereby constitute[s] a concurring opinion" which is subject to disclosure pursuant to 5 U.S.C. 552(a)(2)(A) (App. C, *infra*, p. 37A).

In sum, the court held that all the reports involved herein represent "the final conclusion[s] and reasoning on which the *final* determination[s] of the Board [are] based" (App. C, *infra*, p. 41A) and that, therefore, they are not exempt from compelled disclosure pursuant to exemption 5 as inter-agency or intra-agency memoranda.

On appeal, the Court of Appeals for the District of Columbia Circuit concurred in the district court's con-

[10] Exemption 5 applies to:

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency * * *."

[11] 5 U.S.C. 552(a)(2)(A) provides in relevant part:

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions, including concurring and dissenting opinions, * * * made in the adjudication of cases * * *."

clusions (App. A, *infra*, p. 3A). In addition, the court of appeals held the district court's judgment concerning the reports and recommendations of the regional boards to be supportable on two additional grounds. It ruled that the regional boards were "agencies" within the meaning of 5 U.S.C. 552(a)(2)(A) and that their reports to the National Board could be viewed, either, as the district court held, as final opinions of the National Board, or as final opinions of the regional boards. The court also held that exemption 5 did not apply to the documents—regardless of their status as final opinions—because, it believed, the purposes of exemption 5 would not be thwarted by public disclosure of "a document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties" even though it was "originally prepared for purposes of pre-decisional consultation" (App. A, *infra*, p. 21A).[12]

REASONS FOR GRANTING THE WRIT

This case and *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, in which our petition for certiorari was filed January 11, 1974, present important issues concerning the extent to which the Freedom of Information Act requires the government to disclose internal memoranda which form the basis for governmental decisions, and which are prepared as a part of the process of determining appropriate governmental actions. The decisions in this case and in

[12] The court of appeals has not interpreted its decision as limited to the special procedures of the Renegotiation Board; its judgment in *National Labor Relations Board* v. *Sears, Roebuck & Co.*, No. 73-1233, was based in part on the instant case.

Sears would seriously restrict the freedom of discussion and communication within the government which is essential to its effective functioning and which the exemptions (particularly exemption 5) were designed to protect. These decisions would thus seriously distort the workable balance between opposing interests which this Court recognized as the basic purpose of the Act in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 80.

1. Both courts below concluded that the documents at issue here must be disclosed as final agency opinions. But the recommendations here involved are not final opinions. The division recommendations are considered by the full Board, which alone has the authority and the responsibility to issue the decision. They are prepared by individual Board members who share the ultimate responsibility for the decision, and are addressed solely to the other members with whom this responsibility is shared. They thus are pre-decisional communications between decision-makers at the highest level. See *Sterling Drug, Inc.* v. *Federal Trade Commission*, 450 F. 2d 698, 708 (C.A.D.C.). They are not in any sense the equivalent of concurring opinions, which are designed to explain to the public the writer's reasons for agreeing with the judgment of the majority.

Public disclosure of these documents will impair the decisional process of the agency. Prior to the compelled disclosure ordered by the court of appeals in this case, the author of a divisional report was responsible only for the exposition of the views of the division in terms which could be understood and which would persuade his fellow members of the Board. Under the de-

cision of the court of appeals, however, the author of the report can no longer write solely for his fellows, but must be aware of the fact that he may also be explaining a subsequent decision to the public at large. He will be forced, not simply to report the views of the division, but to assume the responsibility of justifying to the public a proposed decision of the full Board, which may or may not adopt the reasoning of the recommendation. The destruction of the pre-decisional and consultative nature of the divisional reports and recommendations will, therefore, affect adversely the efficiency and quality of the decisional process of the Board.

The same is true of the regional board reports and recommendations.[13] The court of appeals concluded that the regional boards were agencies, and that their reports and recommendations were final decisions subject to review by the National Board. Although this may be a correct analysis of the regional board functions in Class B cases, the regional boards have no independent power of decision in Class A cases (32 C.F.R. 1422.232–2).

[13] Indeed, since no member of the regional board has final responsibility for decision in a Class A case, the disclosure of regional board reports in such cases may be even more inappropriate than the disclosure of divisional reports. As the Court of Claims, per Reed, J., noted in *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 945–946:

"Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with the power to decide and act."

Moreover, the recommendations do not become the final Board decision as a result of their adoption by the Board, since, as the district court found (App. C, *infra*, p. 31A):

> It is important to note that in no case does the Board formally adopt reports or recommendations of either the Regional Boards or its staff. It studies and considers but it does not adopt.[14]

Thus, the regional board reports and recommendations in Class A cases are consultative and pre-decisional only. Even if the regional boards are "agencies," within the meaning of the FOI Act, as the court of appeals held, the reports and recommendations of those regional boards cannot be considered "final opinions" within the meaning of that Act.[15]

2. The court of appeals' alternative holding, that even if these documents are pre-decisional they are not exempt from disclosure under exemption 5 of the

---

[14] The court of appeals explicitly approved this finding (App. A, *infra*, p. 3A).

[15] By expanding the scope of 5 U.S.C. 552(a)(2)(A), and concluding that that section and exemption 5 are mutually exclusive, the court of appeals has seriously limited the scope of exemption 5. As a result of this decision, any agency which exercises its lawful authority to delegate some of its preliminary tasks jeopardizes the ability of those who make the delegation to consult freely with those who perform the preliminary tasks. At least one court, citing the decision in this case, has concluded that the agency in such a case has created an "agency" composed of the delegates and that reports submitted to the parent body must be disclosed as "final opinions" of that "agency." See *Washington Research Project, Inc.* v. *Department of Health, Education and Welfare*, 366 F. Supp. 929, 935 (D.D.C.) appeal filed, C.A.D.C., No. 74-1027.

FOI Act, poses an equally serious threat to effective government operations.

The court of appeals erroneously concluded that the policies underlying exemption 5 would not be jeopardized by requiring the disclosure of documents prepared for pre-decisional consultation if the decision-maker relies upon them for his decision. There is here no incorporation of the pre-decisional documents into the final decision by reference and no other indication that the decision-makers determined that the advisory documents should be considered as part of the final opinion. Cf. *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (C.A.D.C.). Instead, the fact that the decision-maker's conclusions agreed with the recommendation, and no other statement of the basis therefor was issued, was apparently deemed a sufficient "adoption" of the pre-decisional documents to take them outside the scope of exemption 5 once the decision had been made and communicated to the parties involved. The court of appeals concluded that the policies supporting exemption 5 are not jeopardized when the pre-decisional document is made available after the decision has been made, and the document's "whole purpose and effect" is "to support that decision" (App. A, *infra*, p. 18A). But the timing of the disclosure is not significant—so long as the author of the document knows that it is likely to become a public document eventually, the candor and advocacy of positions essential to policy formulation are endangered.

Moreover, the purpose of the documents at issue here is, as we have shown, to make recommendations to those responsible for making the decisions, not to pro-

vide an explanation to the public of that decision. Thus they were not intended to "support" the decision eventually reached, but to suggest to the decision-makers why such a decision would be appropriate. Although the "effect" of the recommendations might be to support the decision reached, that factor is shared by all advisory memoranda which recommend the result eventually reached, and is not sufficient by itself to remove the memoranda from the scope of exemption 5.

Therefore, we submit, the construction of exemption 5 adopted by the court below is inconsistent with the major policy of that exemption, which is "to insure that federal agencies continue to enjoy the free flow of ideas essential to the making of reasoned decisions." See *Sterling Drug, Inc.* v. *Federal Trade Commission*, 450 F. 2d 698, 706 (C.A.D.C.); *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358–1359, (C.A. 2). That construction finds no support in the terms of the exemption or its legislative history.

3. Finally, the decisions below are likely to rigidify the Board's procedures, despite the clear contrary congressional intent. The district court held that the documents involved here were to be made available as final opinions under the Freedom of Information Act "[i]n order for the public to be fully informed [of] the reasons behind" the Board's action (App. C, *infra*, p. 39A). Since, in the court's view, the Board's orders did not provide an adequate analysis of the reasons for its actions, it concluded that the Act required the tracing of the decisional process back to an agency document

which did contain such an analysis, and the identification of that document as the agency opinion. In effect, therefore, the court held that the Act requires the agency to provide an analysis of the basis for its orders. This interpretation, affirmed by the court of appeals, reads the Act too broadly, and is particularly inappropriate when applied to the Renegotiation Board.

The emphasis of the Board's organic statute is upon negotiation rather than adjudication as the method to be used by the Board in eliminating excessive profits. See *Renegotiation Board* v. *Bannercraft Co.*, No. 72–822 decided February 19, 1974, slip op., p. 20. Moreover, as this Court emphasized in *Lichter* v. *United States*, 334 U.S. 742, the procedures used were to be informal and expeditious. Accordingly, the operations of the Board are specifically exempted from most requirements of the Administrative Procedure Act, including 5 U.S.C. 557, which requires an agency to issue findings of fact. 50 U.S.C. App. 1221.[16] The Board is required to provide reasons for its orders only when it makes a determination that excessive profits have been realized by a contractor (50 U.S.C. App. 1215(a))[17].

The district court recognized that the evidence in this record indicated that even though the Board's de-

[16] The Board is subject to the FOI Act.

[17] The instances in which an agency may be required to issue formal findings in the absence of statutory directive are rare. See *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 417. Since there is no need for Board opinions to facilitate judicial review, which is by trial de novo in the Court of Claims, 50 U.S.C. App. (Supp. I) 1218, there is no need for such a non-statutory requirement here.

cision accords with the division's or the regional board's recommendations, the Board decision may have been reached for reasons other than, or in addition to, those set forth in the final recommendation (App. C, *infra,* pp. 31A–32A). Therefore, the decisions below will tend to force the Board to prepare a full statement of reasons for public release in order to avoid misleading the public as to the basis for its decision. Yet Congress specifically recognized the burdens of such a practice and sought to avoid this result, 50 U.S.C. App. 1215(a), 1221. The decisions of the courts below thus erroneously apply the Freedom of Information Act to require the Board to issue the reasons for its actions in every case despite the intent of Congress, as expressed in the statute establishing the Board, to relieve the Board of this responsibility.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

LEONARD SCHAITMAN,
DAVID COHEN,
Attorneys.

FEBRUARY 1974.

APPENDIX A

In the United States Court of Appeals for the District of Columbia Circuit

No. 71-1730

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

v.

THE RENEGOTIATION BOARD, APPELLANT

Argued Feb. 27, 1973—Decided July 3, 1973

Rehearing Denied Sept. 27, 1973

Before BAZELON, Chief Judge, WRIGHT, Circuit Judge, and VAN PELT,* Senior District Judge.

J. SKELLY WRIGHT, Circuit Judge. This appeal involves the validity of a District Court order requiring the Renegotiation Board to disclose documents explaining decisions of the Board and its decision-making delegates, the Regional Boards, made between 1962 and 1965, as to whether 14 companies[1] accrued excess profits in their business with the Government. These documents were sought by Grumman Aircraft Engineering Corporation under the Freedom of Information Act, 5 U.S.C. § 552 (1970), which man-

* Of the United States District Court for the District of Nebraska, sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] The 14 firms are: Avco Corp.; Bell Aerospace Corp.; The Boeing Co.; Douglas Aircraft Co.; Fairchild Hiller Corp.; General Dynamics Corp.; Ling-Temco-Vought, Inc.; Litton Industries, Inc.; Lockheed Aircraft Corp.; Martin Marietta Corp.; McDonnell Co.; North American Aviation, Inc.; Northrop Corp.; and Republic Aviation Corp.

532-812—74——3

dates that Government agencies, including the Renegotiation Board, make available for public inspection and copying "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases * * *." 5 U.S.C. § 552(a)(2)(A). The Act also requires disclosure of "identifiable records," 5 U.S.C. § 552(a)(3), but exempts from the disclosure requirement certain specified materials, 5 U.S.C. § 552(b)(1)–(9).

This is the second time this case is before us. Initially the District Court refused to order disclosure on the ground that the requested documents contained trade secrets and other confidential information covered by the Act's exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4). On appeal we held that Congress did not intend to exempt an entire document simply because it contained confidential information, that the proper procedure where exempted data is contained in the requested documents is to accommodate the Freedom of Information Act's dual policy of promoting public awareness and administrative fairness, on the one hand, and the need for justifiable secrecy on the other, by striking identifying details from the documents prior to release. We remanded the case to the District Court for further proceedings to determine precisely which of the documents or parts thereof sought by Grumman should be produced under the Act. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U.S. App. D.C. 147, 425 F. 2d 578 (1970).

On remand the Board agreed to produce many of the documents requested, but disagreement remained as to whether certain documents generated by the Board and its statutorily authorized decision-making delegates, the Regional Boards, in the decision-mak-

ing process were "final opinions, including concurring and dissenting opinions," producible under 5 U.S.C. § 552(a)(2)(A) or, as appellant contends, inter- or intra-agency memoranda exempt from production under 5 U.S.C. § 552(b)(5). The District Court's opinion, D.D.C., 325 F.Supp. 1146 (1971), describes at length the kinds of documents at issue and holds that the documents requested by Grumman should be produced under the Freedom of Information Act as "final opinions, including concurring and dissenting opinions," of the Renegotiation Board. Given the evident care of the District Court's delineation of the facts and its discussion of the issues, we avoid covering the same ground. We hold its findings of fact not clearly erroneous and concur in its conclusions and its judgment. Indeed, we find its judgment as to the principal documents still in dispute supportable on two additional grounds.[2]

I

The District Court ordered disclosure of Regional Board reports in Class A renegotiation cases[3] where pursuant to Renegotiation Board regulations (a) the Regional Board decides that a clearance, or finding of no excess profits liability, is proper[4]; (b) the Re-

[2] We agree, of course, with the ruling and reasoning of the District Court requiring disclosure of reports and recommendations of divisions of the Renegotiation Board and any concurrences or dissents thereto. 325 F.Supp. at 1152–1153.

[3] Cases are designated as Class A generally when a firm has derived from the Government contract under scrutiny more than $800,000 in profits. 32 C.F.R. § 1471.2(b) (1972). Where the contract has yielded less than $800,000 in profits, it is designated Class B. *Ibid.* The documents sought here all involved Class A cases.

[4] *See* 32 C.F.R. §§ 1472.3(i), 1473.2(a) (1972). Once the Regional Board has made its determination, it notifies the contractor thereof and forwards the case, along with the report at issue here, to the National Board. *Ibid.*

negotiation Board (hereinafter the National Board) notifies the Regional Board that "it is in accord with the [Regional Board's] determination"[5]; and (c) the Regional Board issues a notice to the contractor under investigation of his non-liability.[6] These reports, which the District Court found were "prepared and signed by a Regional Board member, and [were] signed on behalf of the Regional Board by its Chairman," 325 F.Supp. at 1153, were held by the District Court to be a "final opinion of the [National] Board," *ibid.*, and thus required to be produced under the Freedom of Information Act.

The National Board strongly challenges this disposition on the ground that the Regional Boards are merely advisory to the National Board, that the National Board is in fact the final decision-maker in cases of this sort, and, finally, that the unrecorded and undisclosed reasons for the National Board's agreement with the Regional Board's finding might have been different from those contained in the Regional Board report. As the District Court's opinion indicated, his argument loses much of its force when one considers the perfunctory nature of the National Board's review in such cases, the fact that in cases of this sort the National Board, in accepting the determination of the Regional Board, rejects the alternative of assigning the case to its own docket for independent consideration by a division of its membership,[7] and the fact that the determination

[5] 32 C.F.R. § 1473.2(a).

[6] *Ibid.* The form of notice issued in such cases is printed at 32 C.F.R. § 1498.6(a) (1972).

[7] The procedure followed in the kinds of cases producing the documents Grumman seeks here is in sharp contrast to the case where the National Board is not satisfied with the Regional Board's determination. In the latter case the National Board will notify the Regional Board "that it has not satis-

reflected in the clearance notice to the contractor is attributable to "the Regional Board pursuant to due delegation of authority" under National Board regulations.[8]

[1] Conceding, *arguendo,* that the Regional Board report is not tantamount to a "final opinion" of the National Board, we have no doubt that it does represent the "final opinion" of the Regional Board. Not only is the report, as the District Court found, "prepared and signed by a Regional Board member, and * * * signed on behalf of the Regional Board by its Chairman," 325 F.Supp. at 1153, but the practicalities of National Board procedure dictate this conclusion. When the Regional Board decides that a clearance should be granted in the type of case at issue here, the report is the only document in the file it forwards to the National Board which purports to justify the Regional Board's clearance recommendation in terms of the statutory standards the National Board is re-

---

fied itself that the determination is correct," 32 C.F.R. § 1473.2 (a), will "direct the Regional Board to advise the contractor that a different determination may be made," *ibid.*, and in many cases will "reassign the case to the Board." *Ibid.* When this reassignment occurs, the case will generally be "assigned to a [3-man] division of the [5-man National] Board. The division will study the information and data assembled by the Regional Board and will determine what additional information or data, if any, is needed. The division will secure such additional information and data as it deems necessary and will conduct an independent study of the case. The division will not be bound or limited in any manner by any evaluation, recommendation or determination of the Regional Board." 32 C.F.R. § 1472.4(b). The deposition given by the chairman of the National Board indicates that this sort of intensive, wholly *de novo,* review is not undertaken where the National Board does not reassign the case to its own docket but merely notifies the Regional Board that it agrees with its determination and orders the Regional Board to issue notice. Appendix at 26–27, 172–173.

[8] 32 C.F.R. § 1498.6(a).

quired to apply to the facts of the case.[9] And the National Board itself acknowledges that the report is treated at the National Board level as the Regional Board's justification of its recommendation.[10] Given this function, plus the formal role it is assigned in the National Board's regulations, 32 C.F.R. § 1473.2(a), and the District Court's findings, the Regional Board report clearly occupies the same opinion status as any document produced by a decision-maker in an adjudicatory-like process and forwarded to a reviewing tribunal.

[2] For purposes of the Freedom of Information Act, the crucial question then becomes whether the Regional Board, wholly apart from the National Board, is to be considered an "agency" to which the provisions of the Act, including the requirement of disclosure of "final opinions," applies. *Compare Soucie* v. *David*, 145 U.S.App.D.C. 144, 149–153, 448 F.2d 1067, 1072–1076 (1971), with *International Paper Co.* v. *FPC*, 2 Cir., 438 F.2d 1349, 1359, cert. denied, 404 U.S. 827, 92 S.Ct. 61, 30 L.Ed.2d 56 (1971). We believe the Regional Board should be so considered.

The statutory definition of "agency" in the Freedom of Information Act is supplied in Section 2 of the Administrative Procedure Act, 5 U.S.C. § 551(1) (1970),[11] which states: "'agency' means each author-

[9] The statutory standards are set forth in the Renegotiation Board's governing statute, 50 U.S.C.App. § 1213(e)(1)–(6) (1970). This court has termed the standards "rather general" and has noted that along with the Board's regulations, *see* 32 C.F.R. § 1460.8 (1972), they vest the Board with "extremely broad discretion" in making a determination of excess profits. *Bannercraft Clothing Co.* v. *Renegotiation Board*, 151 U.S.App. D.C. 174, 178 n. 3, 466 F.2d 345, 349 n. 3 (1972), cert. granted, 410 U.S. 907, 93 S.Ct. 967, 35 L.Ed.2d 269 (1973).

[10] Brief for appellant at 13.

[11] *Soucie* v. *David*, 145 U.S.App.D.C. 144, 149–150; 448 F.2d 1067, 1072–1073 (1971).

ity of the Government of the United States, whether or not it is within or subect to review by another agency * * *." This statutory language obviously disposes of any contention that the Regional Board cannot be considered an "agency" merely because it is subject, in the kinds of cases for which the reports are sought here, to *de novo* review by the National Board. But beyond that the provision is hardly self-defining, as both this court [12] and commentators,[13] have acknowledged.

We believe that several broad guidelines as to the meaning of the term "agency" have emerged and that they compel the conclusion that the Regional Boards fit within the APA definition. The leading case, of

[12] *Soucie* v. *David*, *supra* note 11, 145 U.S.App.D.C. at 150, 448 F.2d at 1073.

[13] *See* Freedman, Administrative Procedure and the Control of Foreign Direct Investment, 119 U.Pa.L.Rev. 1, 4–18 (1970). Professor Davis has characterized the definition of "agency" supplied in the statute as "not very satisfactory." 1 K. Davis, Administrative Law Treatise § 1.01 at 1 n. 1 (1958). But the definition he suggests—"a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication of rule-making." *id.* at 1—is probably itself too narrow, as we suggested in *Soucie* v. *David*, *supra* note 11, 145 U.S. App.D.C. at 150, 448 F.2d at 1073. The Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, drafted in 1967 just after the Freedom of Information Act was enacted, discusses the Act's applicability to any "agency" as defined in 5 U.S.C. § 551(1), and suggests a broader definition: "every department, board, commission, division, or other organizational unit in the executive branch." *Id.* at 4. It is clear that the Regional Boards, as part of the Renegotiation Board apparatus, are "in the executive branch." 50 U.S.C. App. § 1217(a) (1970), and they are certainly organizational units. If the Renegotiation Act itself and the regulations mean anything, *see* text at pp. 714–715, *infra*, they would appear to meet the definition supplied by the Attorney General's memorandum.

course, is *Soucie* v. *David, supra,* where we held that the Office of Science and Technology in the Office of the President is to be considered an "agency" for the purposes of Section 2 of the Administrative Procedure Act and therefore for the Freedom of Information Act. *Soucie,* relying on the legislative history of the APA, reasoned that the "APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions." 145 U.S.App.D.C. at 150, 448 F.2d at 1073. We then concluded that OST met this broad standard and was not to be considered merely personal staff to the President.[14] We relied on several factors for this conclusion, including indications that Congress, in acquiescing in the presidential reorganization plan that created OST, believed that the unit would assume the independent administrative function of evaluating congressionally approved federal scientific programs. 145 U.S.App.D.C. at 151–152, 448 F.2d at 1074–1075.

The factors we relied on in *Soucie* to conclude that OST was an "agency" for purposes of the Administrative Procedure Act and thus for purposes of the Freedom of Information Act are clearly evident in this case. There is no question that the Regional Boards have been granted what *Soucie* termed "substantial independent authority." Equally, the Regional Boards fit the functional definition of "agency" proposed by the commentator who has given the question the most exhaustive study. Professor James O.

[14] *Compare International Paper Co.* v. *FPC*, 2 Cir., 438 F.2d 1349, 1359 (1971) (holding that the staff of the FPC is not to be considered an agency for purposes of either the Freedom of Information Act or the APA on the ground that it lacks any legally recognized decision-making status). *See also Miller* v. *Smith*, S.D.N.Y., 292 F.Supp. 55 (1968).

Freedman.[15] He argues that the primary task in applying the term "agency" is "to identify centers of gravity of the exercise of administrative power * * * where substantial 'powers to act' with respect to individuals are vested."[16] The National Board regulations, setting forth the powers of the Regional Boards, point unmistakably to an affirmative conclusion in this respect as well. The Regional Boards have their own investigating and negotiating personnel with whom the contractors are instructed to discuss their excess profit liability prior to decision of their cases by the Regional Boards.[17]

Following these investigations and negotiations, moreover, the members of the Regional Board are instructed to make a formal recommendation as to the contractor's excess profit liability[18] and this recommendation is communicated openly to the contractor prior to any assumption of jurisdiction by the National Board.[19] Furthermore, in many cases the Regional Boards are empowered to make final decisions not even reviewable by the National Board.[20] In other

[15] *See* note 13 *supra*.

[16] Freedman, *supra* note 13, 119 U.Pa. L.Rev. at 9.

[17] *See* 32 C.F.R. § 1472.3.

[18] 32 C.F.R. § 1472.3(i).

[19] *Ibid.*; 32 C.F.R. § 1473.2(a).

[20] The Regional Boards are given this power in Class B cases, *see* note 3 *supra*, where it decides that a clearance should be granted, 32 C.F.R. § 1473.2(b), and where it has reached an agreement with the contractor that a given amount of excess profits should be refunded, 32 C.F.R. § 1474.3(b). Review by the National Board is mandatory in Class A cases whether the Regional Board decides a clearance should be granted, 32 C.F.R. § 1473.2(a), reaches an agreement with the contractor on a specified refund, 32 C.F.R. § 1474.3(a), or decides that a refund order should be issued and is unable to reach agreement with the contractor on a specified amount, 32 C.F.R. § 1475.3(a) (1972). In Class B cases, where no agreement can be reached between the contractor and the Regional Board and the Regional Board determines that a refund of excess profits

words, the Regional Boards serve as a discrete, decision-producing layer in the renegotiation process.[21] And this is the case from the standpoint of the National Board, which often, but not always, reviews their decisions,[22] as well as from the standpoint of the regulated parties, the contractors, who conduct negotiations with the Regional Boards and are communicated the Regional Board's conclusions prior to and separate from any possible subsequent negotiations or decisions at the National Board level.

It is also clear to us that the exercise of formal decision-making power by the Regional Boards, as authorized by delegation from the National Board, was within Congress' contemplation when it established the Renegotiation Board apparatus. Evidence that Congress believed the governmental body in question would exercise authority of the kind customarily granted legislatively was an important factor in *Soucie*, as we have pointed out, and we believe it exists in ample measure here. In fact, we need go no further than the Renegotiation Act of 1951 itself for a conclusive indication that Congress foresaw and approved creation of Regional Boards with the kind of decisional authority we feel is sufficient to hold that the Regional Boards are "agencies." Section

---

should be paid, the "[National] Board may review such determination upon its own motion, or, in its discretion, at the request of the contractor." 32 C.F.R. § 1475.3(b).

[21] *See also Bannercraft Clothing Co. v. Renegotiation Board*, *supra* note 9, 151 U.S. App. D.C. at 179, 466 F. 2d at 350, where we characterized the Regional Board decisions as follows: "[T]he recommendations made by the lower bureaucratic levels * * * are * * * exceedingly important to the contractor. Indeed, their importance derives from their non-finality, since it is the possibility that they will be reversed and increased which provides the incentive to accept them without resort to theoretically available *de novo* appeals."

[22] *See* note 20 *supra*.

107(d) of the statute, 50 U.S.C.App. § 1217(d) (1970), provides in pertinent part:

"The Board may delegate in whole or in part any function, power, or duty (other than its power to promulgate regulations and rules and other than its power to grant permissive exemption * * *) *to any agency of the Government, including any such agency established by the Board*, and may authorize the successive redelegation, within limits specified by it, of any such function, power, or duty to any agency of the Government, including such agency established by the Board * * *"

[Emphasis added.]

There is further reason to believe that Congress meant the term "agency" in the above quoted statute—describing the subsidiary decision-making bodies now known as Regional Boards—to have the same meaning as the term has in Section 2 of the APA. For Congress, in establishing the Renegotiation Board, had the detailed requirements of the APA at the forefront of its concern. In another section of the Renegotiation Act of 1951, 50 U.S.C.App. § 1221 (1970), it specifically excluded the Board's functions from the operation of the APA with one important exception, the APA's public information provision, which is now, of course, the Freedom of Information Act. Given this legislative attention to the APA, the choice of the word "agency" must have been purposeful, lending further support to our view that the Regional Boards are covered by the term "agency" utilized in the APA and thus must be considered "agencies" for purposes of the Freedom of Information Act.

The National Board's own regulations corroborate the conclusion that the Regional Boards, apart from the National Board, are agencies subject to the Free-

dom of Information Act. And the National Board's own view of its responsibilities, as evidenced in its regulations, is entitled to considerable weight in interpreting the relevant statutes. *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L.Ed.2d 616 (1965). The regulations acknowledge that pursuant to the Freedom of Information Act all clearances and agreements determining excess profits must be disclosed. 32 C.F.R. § 1480.5 (1972). In many cases these decisions to issue clearances or make agreements with contractors are solely the Regional Board's decisions and no review whatever is undertaken by the National Board.[23] Thus the regulations clearly subject to the requirements of the Freedom of Information Act documents that represent administrative actions whether taken by the National Board or exclusively by the Regional Boards. This suggests to us that the National Board itself, for some purposes at least, considers the Regional Boards "agencies" separately subject to the Freedom of Information Act's provisions.

Since we conclude that the Regional Board reports at issue here should be considered "final opinions" of an "agency" and thus subject to disclosure under 5 U.S.C. § 552(a)(2)(A), it necessarily follows that the documents cannot be exempted from disclosure as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" under Exemption 5 of the Act, 5 U.S.C. § 552(b)(5). Obviously, the two sections are mutually exclusive. By definition "final opinions, including concurring and dissenting opinions" cannot be "inter-agency or intra-agency memorandums."

---

[23] See 32 C.F.R. §§ 1473.2(b), 1474.3(b) and the discussion in note 20 *supra*.

[3] Exemption 5 is simply irrelevant to final agency opinions because such opinions are decisional documents rather than purely pre-decisional, consultative and deliberative inter- or intra-agency memoranda. *See* Section II *infra*. The fact that determinations by the Regional Boards are in some cases reviewable by the National Board does not make the Regional Board reports on which they are based inter- or intra-agency documents under Exemption 5 and thus not disclosable final opinions of the Regional Boards, any more than lower court opinions subject to appeal are not final. Indeed, finality is ordinarily the touchstone of appealability. *See, e.g.*, 5 U.S.C. § 704 (1970); 28 U.S.C. § 1291 (1970). Moreover, the Administrative Procedure Act specifically provides that an "agency" may be reviewable by another agency, 5 U.S.C. § 551 (1) (1970), and the Freedom of Information Act requires disclosure of final orders and opinions of "each agency," 5 U.S.C. § 552(a)(2)(A), whether or not reviewable by another agency.

II

[4] We also believe the District Court's decision can stand for reasons other than the status of Regional Board reports as "final opinions, including concurring and dissenting opinions." The Freedom of Information Act mandates disclosure of a far broader category of agency papers. 5 U.S.C. § 552(a)(3) calls for production of "identifiable records." There is no question that the Regional Board reports fit into this category as Grumman pointed out in its original pleadings.[24] No argument has been made by the Renegotiation Board that the papers were not "identifiable" or that Grumman's request was insuffi-

[24] Joint Appendix at 41 in *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 138 U.S.App.D.C. 147, 425 F.2d 578 (1970).

ciently specific. The nature of the documents and the naming of the companies and subject matter concerned and the dates when they were prepared make clear that the Government could identify them without inordinate difficulty. *See National Cable Television Assn.* v. *FCC*, — U.S.App.D.C. —, 479 F.2d 183 (1973); *Irons* v. *Schuyler*, 151 U.S.App.D.C. 23, 465 F.2d 608, *cert. denied*, 409 U.S. 1076, 93 S.Ct. 682, 34 L.Ed. 2d 664 (1972). And it is settled that once the "identifiability" requirement is met, as it is here, the central question remaining in Freedom of Information Act litigation is whether any of the Act's exemptions apply. *See Bristol Myers Co.* v. *FTC*, 138 U.S.App. D.C. 22, 25, 424 F.2d 935, 938 (1970).

As we have indicated, appellants rely on Exemption 5. In our view this exemption for "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" does not apply to the documents at issue, wholly apart from their status as "final opinions." We reach this conclusion on the ground that the policies underlying the exemption are simply not jeopardized by disclosure of the documents Grumman seeks here.

[5] At the outset we must acknowledge that "[d]rawing such a line between what may be withheld and what must be disclosed is not without difficulties." *EPA* v. *Mink*, 410 U.S. 73, 86, 93 S.St. 827, 835, 35 L.Ed.2d 119 (1973). At the same time it seems clear that Congress, in enacting the exemption, did not mean for agencies to refuse disclosure of documents merely on the ground that such documents were customarily circulated only within the bureaucracy. *See Bristol Myers Co.* v. *FTC*, *supra*, 138 U.S.App.D.C. at 26, 424 F.2d at 939. If agency custom were the touchstone for applicability of the exemption, the pro-disclosure policy of the Act would be easily evaded. As its language

indicates, the exemption is intended to adopt an evidentiary privilege that preceded the Freedom of Information Act. The statutory modification of the phrase "inter-agency or intra-agency memorandums or letters" with the phrase "which would not be available by law to a party other than an agency in litigation with the agency" makes clear the Act's adoption of a pre-existent privilege from discovery, and this court has so held. *Ackerly v. Ley*, 137 U.S.App.D.C. 133, 138, 420 F.2d 1336, 1341 (1969).[25] *See also EPA* v. *Mink*, *supra*, 410 U.S. at 87–90, 93 S.Ct. 827; *Tennessean Newspapers, Inc.* v. *FHA*, 6 Cir., 464 F.2d 657, 660 (1972); *GSA* v. *Benson*, 9 Cir., 415 F.2d 878, 880 (1969). And this privilege, it is also clear, aims to further a discrete set of policies. *See Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 944–947, 141 Ct.Cl. 38 (1958); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, D. D.C., 40 F.R.D. 318, 324–327 (1966), affirmed per curiam, 128 U.S. App.D.C. 10, 384 F.2d 979, cert. denied, 398 U.S. 952, 88 S.Ct. 334, 19 L.Ed.2d 361 (1967).

The case law involving the privilege for governmental papers which underlies Exemption 5 indicates that the purpose of nondisclosure is protection of the "consultative functions" of government. *EPA* v. *Mink*, *supra*, 410 U.S. at 87–90, 93 S.Ct. 827. The privilege aims to cover "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, *supra*, 40 F.R.D. at 324. Put another way, the privilege aims to protect "free discussion of prospective operations and policy." *Kaiser Aluminum & Chemical Corp.* v. *United States*, *supra*, 157 F Supp. at 947.

[25] *See also Freeman* v. *Seligson*, 132 U.S.App.D.C. 56, 69, 405 F.2d 1326, 1339 (1968).

Protecting the confidentiality of advice given during governmental deliberations prior to actual promulgation of policy is, of course, eminently sensible. For it is well recognized that pre-decisional deliberation requires privacy so that staffers and decision-makers alike may engage in free and frank consideration of alternatives.[26] Moreover, as this court suggested recently in *Sterling Drug Inc.* v. *FTC*, 146 U.S.App. D.C. 237, 245–247, 450 F.2d 698, 706–708 (1971), the public might be misled by exposure to discussions occurring before policy affecting it were actually determined. And finally, delving into predecisional policy deliberations impairs the integrity of decision-makers; officials should be judged by what they decide, not for the matters they properly considered before making up their minds.[27]

But the case for applying the privilege, and thus the exemption, is markedly weaker where the documents at stake are not solely part of the consultative

[26] *See generally Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, D.D.C., 40 F.R.D. 318, 325 (1966); *cf. Hickman* v. *Taylor*, 329 U.S. 495, 511, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The practical underpinnings of the need for pre-decisional privacy were well stated by Mr. Justice Reed in *Kaiser Aluminum & Chemical Corp* v. *United States*, 157 F. Supp. 939, 945–946, 141 Ct.Cl. 38 (1958), where he pointed out: "Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen."

[27] *See Boeing Airplane Co.* v. *Coggeshall*, 108 U.S.App.D.C. 106, 112, 280 F.2d 654, 660 (1960); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, *supra* note 26, 40 F.R.D. at 325–326. *See also United States* v. *Morgan*, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

and deliberative process, but rather reflect actual decisions communicated outside the agency. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra,* for example, stressed that the documents sought in that case were "pre-decision data."[28] Professor Davis has put the matter well, arguing that the exemption should apply only to "papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be." Davis, The Information Act: A Preliminary Analysis, 34 U.Chi.L.Rev. 761, 797 (1967).

This limitation is supported by the House Committee Report on the Freedom of Information Act which stressed that "a Government agency cannot always operate effectively if it is required to disclose

[28] 40 F.R.D. at 326. Similarly, in *Kaiser Aluminum & Chemical Corp.* v. *United States, supra* note 26, the Court of Claims stressed that the document the plaintiff unsuccessfully sought there in a breach of contract suit against the Government was a "memorandum * * * written by a Special Assistant to the War Assets Liquidator. His duties, at least so far as the contracts here involved are concerned, were confined to recommendations and advice on program policy. He played no part in the operative events involved in this case and had no relations or discussions with plaintiff or its competitor." 157 F. Supp. at 943. But Mr. Justice Reed, speaking for the Court of Claims, noted that the claim of executive privilege there would rest on much weaker ground if the papers by the officials reflected actual, effective decisions: "If the Special Assistant played a part in operative events, *e.g.*, determination of costs or values, representations to Kaiser or Reynolds or survey of the plants, a different situation might exist. We therefore consider this case on the basis of a refusal by the Administrator to produce an advisory opinion on intra-office policy in relation to the sales to Kaiser and Reynolds." *Id.* at 944. *See also United States* v. *Procter & Gamble Co.*, D.N.J., 25 F.R.D. 485, 489 (1960) (noting that the privilege should not apply when the Government document at issue "did not evidence an operative decision").

documents or information which it has received or generated *before it completes* the process of awarding a contract or issuing an order, decision or regulation. This clause [Exemption 5] is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy." H.R. Rep.No.1497, 89th Cong., 2d Sess., 10 (1966). (Emphasis added.) And the policies supporting Exemption 5 as well as its predecessor privilege—the practical need for privacy in the formulation of policy, avoiding misleading the public, and judging officials for what they actually decide rather than what they say or write to themselves beforehand—are not jeopardized when, after a decision has been communicated to the public by a decision-maker, a document whose whole purpose and effect, as with the Regional Board reports, here, are to support that decision is disclosed. *See* Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 Harv.L. Rev. 1047, 1057–1061 (1973).

[6] Thus for purposes of applying Exemption 5 we believe a distinction must be drawn between documents composed exclusively for purposes of assisting policy formulation and those which serve to reflect policy already made and announced.[29] *Cf. Tennessean*

[29] We believe the line we draw between "pre-decisional" and "decisional" documents is fully consistent with our decision in *Sterling Drug Inc.* v. *FTC*, 146 U.S.App.D.C. 237, 450 F.2d 698 (1971). There we held that memoranda of the FTC staff, which, unlike the Regional Boards, is not assigned any decisional responsibility, were privileged under Exemption 5. In the circumstances of that case, it was clear that the staff memoranda were not meant or likely to reflect accurately the agency decisions in which the plaintiffs were interested. Moreover, the staff-produced papers were clearly drafted for "consultative" purposes: some of them were written before the FTC members approved a merger and some were written after

Newspapers, Inc. v. *FHA*, *supra*, 464 F.2d at 660–661. Indeed, in view of our obligation "to delimit the exception as narrowly as consistent with efficient Government operation," *EPA* v. *Mink*, *supra*, 410 U.S. at 89, 93 S.Ct. at 837, *quoting* S.Rep. No. 813, 89th Cong., 1st Sess., 9 (1965), it is incumbent on us to

---

the merger approval but before the FTC initiated proceedings against a second merger and served to compare the two mergers. Judge Tamm concluded that in such circumstances the dangers of misleading the public and embarrassing pre-decision communications between staff and decision-maker were apparent, and the FTC's invocation of Exemption 5 was proper. But he made made clear that he agreed with the comment in Chief Judge Bazelon's concurring and dissenting opinion that if "the memoranda had been adopted as policy," 146 U.S.App.D.C. at 252 n. 8, 450 F.2d at 713 n. 8, the exemption should not apply. 146 U.S.App.D.C. at 245, 450 F.2d at 706. On similar grounds *Sterling Drug* also held that two memoranda prepared by individual commissioners comparing the two mergers were not only purely consultative in nature, but were not likely to reflect fully the reasons either of the decision-makers voted to allow the previous merger. 146 U.S.App.D.C. at 246, 450 F.2d at 707.

Of course, neither of the kinds of documents *Sterling Drug* held were covered by Exemption 5 could fairly be termed decisional in the sense that they were treated as the end product of the decisionmaker's deliberation and utilized to justify a decision openly taken. Disclosing papers of this sort, we have said, cannot be held to intrude on frank pre-decisional communications and deliberations whose exposure may be both misleading and embarrassing. Once there is solid reason to believe a paper is considered by a decision-maker to be the basis for his decision and utilized as a justifying document, it is clear the paper can no longer be said to demonstrate merely the preliminary deliberations of a decision-maker or his staff, on which publicity may have a future chilling effect, but acquires a more formal, finished status which a decision-maker should be more ready to have attributed to himself. *See* Note, The Freedom of Information Act and the Exemption for Intra-Agency Memoranda, 86 Harv.L.Rev. 1047, 1060–1061 (1973).

Sterling Drug certainly recognizes this distinction. Judge

enunciate such a limitation.[30] Of course, the line is not always a bright one. Some papers can serve both functions—assisting pre-decisional deliberation and unambiguously rationalizing announced decisions. For example, in *American Mail Line, Ltd.* v. *Gulick*, 133 U.S.App.D.C. 382, 411 F.2d 696 (1969), what began as a staff memorandum in the pre-decisional stage was

---

Tamm's panel opinion not only endorsed Chief Judge Bazelon's "adoption as policy" test. Equally important, the court ordered the District Court on remand to consider disclosure of documents issued by the FTC as a whole to private parties indicating its approval of the first merger. Judge Tamm noted that with material of this sort "the danger that any explanation they may give of [the initial merger] is not the correct one is greatly reduced. We also feel the policy of promoting the free flow of ideas within the agency does not apply here, for private transmittals of binding agency opinions and interpretations should not be encouraged." 146 U.S.App.D.C. at 247, 450 F.2d at 708. In our case, of course, the entire Regional Board reports are not ordinarily transmitted to regulated parties. But this difference is not crucial. *Sterling Drug's* paramount significance for purposes of this case is its stress on two factors: the likelihood that the papers are accurate representations of what the decision-maker used as the basis for his action and the likelihood that distinctively pre-decisional communications will not be jeopardized. Put another way, this aspect of *Sterling Drug* and our decision today both deal with papers whose unmistakable effect is to indicate that the "free flow" of pre-decisional consultation has ceased and a decision has jelled.

[30] This limitation is not the only well recognized limitation on Exemption 5. In *EPA* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the Supreme Court, following the lead of *Soucie* v. *David*, *supra* note 11, and *Bristol Myers Co.* v. *FTC*, 138 U.S.App.D.C. 22, 424 F.2d 935 (1970), noted that even where a document does contain pre-decisional advice or recommendations it does not follow that the entire document may be suppressed. "[P]urely factual, investigative matters" also contained in the document may be disclosed under the Freedom of Information Act, so long as the advisory, policy-type materials are deleted. 410 U.S. at 87-94, 93 S.Ct. 827, 35 L.Ed.2d 119.

transformed into a document that had to be disclosed by the agency's admission in its publicly communicated order that its decision was based on the memorandum.

[7] In other cases, the basis of the decision may not be so openly admitted. But the difficulty of line-drawing between documents that reflect only pre-decisional deliberation and those which reflect decisions communicated to the public should not eviscerate the principle. And the principle is a simple one: a document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public disclosure on the ground that it was originally prepared for purposes of pre-decisional consultation, because the agency has customarily not disclosed the document, or because the agency labels the document other than what it really is. Therefore, since the Regional Board reports clearly reflect and are used to justify decisions of the Regional Board communicated to the contractors under scrutiny, they must fall outside the scope of Exemption 5 and should be disclosed as "identifiable records."

III

[8] Several weeks after the District Court's opinion rejecting the Government's argument that the documents Grumman sought should remain privileged under Exemption 5 was issued, the Government moved for rehearing under Rule 59, Fed.R.Civ.P., requesting the District Court to consider a formal claim of executive privilege by the chairman of the Renegotiation Board for the first time during the litigation. In our view, the District Court properly denied the motion for rehearing as untimely without considering its merits.

[9] Ordinarily Rule 59 motions for either a new trial or a rehearing are not granted by the District Court where they are used by a losing party to request the trial judge to reopen proceedings in order to consider a new defensive theory which could have been raised during the original proceedings. *Echevarria v. United States Steel Corp.*, 7 Cir. 392 F.2d 885, 892 (1968); *Rue v. Feuz Construction Co.*, D. D.C., 103 F.Supp. 499, 502 (1952). *See also* 6A J. Moore, Federal Practice ¶ 59.07 (1972). The Government attempts to avoid applicability of this well established principle, one that is required for the orderly disposition of judicial business, by arguing that it had no "occasion" to raise the executive privilege claim before the District Court opinion was handed down.

[10, 11] We disagree. First of all, the Government had sufficient "occasion" to raise all its legal claims long before the District Court took the case under advisement. On remand from this court's original decision, the District Court ordered a deposition taken from the chairman of the Renegotiation Board to shed more light on the Board's decisional process to help the court determine whether the documents sought were final opinions. During the deposition proceedings the Board chairman argued, as the Government does here, that allowing production of the documents sought by Grumman would mean disclosure of what he felt were essentially advisory, consultative papers. But the Government chose not to argue executive privilege in the memorandum of points and authorities subsequently submitted to the court or in oral argument before the District Court. It could not have been unaware of the possible relevance of executive privilege to its case, for it did invoke Exemption 5 of the Freedom of Information Act. And the history and language of that exemption make clear that Congress

did intend to codify at least some components of the executive privilege doctrine as it had been applied in pre-Freedom of Information Act cases. *See Ackerly v. Ley, supra,* 137 U.S.App.D.C. at 138, 420 F.2d at 1341. Since we cannot disturb the District Court's ruling on a Rule 59 motion absent a finding of abuse of discretion, *see Atchison, Topeka & Santa Fe R. Co. v. Jackson,* 10 Cir., 235 F.2d 390, 394 (1956); *Mayer v. Higgins,* 2 Cir., 208 F.2d 781 (1953); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 331, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), plainly no reversal is called for.

We are asked to hold that the ordinary standards governing a District Court's decision on a Rule 59 motion have no application because of the unique nature of an executive privilege claim. Properly noting that executive privilege, like the narrower privilege against disclosure of military secrets, "is not to be lightly invoked," *United States v. Reynolds,* 345 U.S. 1, 7, 73 S.Ct. 528, 532, 97 L.Ed. 727 (1953), the Government says that it follows that the rule requiring clearly available defenses raised in time for trial courts to pass on them in the normal course of proceedings has no place. We are given no reasoning or serious policy arguments to support this conclusion. Just because the assertion of executive privilege, with its constitutional overtones, is a matter of obvious gravity, *see Soucie v. David, supra,* 145 U.S.App. D.C. at 149, 448 F.2d at 1072, and like any constitutional claim should not be used to dispose of a case where a statutory claim can do equal service, it hardly follows that the Government should be allowed to play cat and mouse by withholding its most powerful cannon until after the District Court has decided the case and then springing it on surprised opponents and the judge. In saying this, we do not mean to

suggest that this particular cannon, in the context of this case, is any more than a popgun. If the claim were indeed of such gravity as the Government now suggests, we can only wonder why the Government failed to alert the District Court in a less extraordinary manner.

Affirmed.

APPENDIX B

In the United States Court of Appeals for the District of Columbia Circuit

No. 71-1730 September Term, 1973

(Civil Action 1595-68)

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

v.

THE RENEGOTIATION BOARD, APPELLANT

Before: BAZELON, Chief Judge; WRIGHT, Circuit Judge and VAN PELT*, Senior United States District Judge for the District of Nebraska.

ORDER

Filed September 27, 1973

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

HUGH E. KLINE,
Clerk.

ROBERT A. BONNER,
Chief Deputy Clerk.

*Sitting by designation pursuant to Title 28 U.S. Code Section 294(d).

APPENDIX C

In the United States District Court for the District of Columbia

Civ. A. No. 1595–68

GRUMMAN AIRCRAFT ENGINEERING CORPORATION, PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

April 26, 1971

OPINION

CORCORAN, District Judge.

I.

The Freedom of Information Act[1] requires the Government to make available to the public "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."

In *Grumman Aircraft Engineering Corporation* v. *Renegotiation Board*, 138 U.S.App.D.C. 147, 425 F.2d 578 (1970), the United States Court of Appeals for the District of Columbia held that under the Freedom of Information Act Grumman Aircraft Engineering Corporation (hereinafter "Grumman") was entitled to examine "final orders and opinions" of The Renegotiation Board (hereinafter the "Board") after suitable deletions by the Board to protect confidential information. The case was then remanded to this Court for a determination of whether certain docu-

[1] 5 U.S.C. § 552(a) (2) (A) (Supp. IV, 1969).

ments sought to be examined by Grumman constituted final orders and opinions.

II.

In its initial application to the Board, Grumman sought opinions and orders issued during the renegotiation of the contracts of fourteen competing companies during the years 1962 through 1965, as well as documents concerning its own renegotiations for the year 1965. Following the Court of Appeals decision, the Board furnished to Grumman copies of fifty-one so-called "clearance notices" and two so-called "unilateral orders" which the Board deemed to be the final orders and determinations with respect to the fourteen competitor corporations. Later the Board also furnished certain "performance reports" relating to Grumman and one "statement of facts and reasons" relating to one of the fourteen competing companies involved in renegotiations. Further, it amended its regulations in material respects to allow public access to certain of its records.[2]

In light of such action, taken subsequent to the Court of Appeals decision, the Board now asserts that it has fully complied with the mandate and urges that the issues are moot. Grumman, however, takes the position that there are additional documents involved in the renegotiation proceedings involving itself and the fourteen competitor companies which constitute final orders and opinions of the Board.[3] The Board has moved for summary judgment. Grumman has moved for an order "in accordance with the mandate of the Court of Appeals.

---

[2] 36 Fed.Reg. 3808 (1971), *infra* at 1150.

[3] The Grumman demand is detailed *infra* at 1151.

III.

As an aid to the resolution of the issue of what constitutes a final order or opinion the Court granted Grumman permission to depose Mr. Lawrence E. Hartwig, Chairman of The Renegotiation Board, as to the procedures followed by the Board and the type of documentation which pertains to typical renegotiation cases. The gist of Mr. Hartwig's testimony concerning renegotiation procedures [4] follows.

(1) Renegotiation in all cases is initiated at the headquarters of the Board in Washington, D.C. The cases are separated into two categories, viz., Class A and Class B. A Class B case is one in which the renegotiable profits are less than $800,000. All others are Class A cases.

(2) When a case is filed with the Board it is first considered by the Office of Accounting to check sales, costs, and other accounting factors, and thereafter by the Office of Screening and Exemption. Those cases which appear not to involve excessive profits are screened out at headquarters through this procedure. All other cases are assigned to one of two Regional Boards usually, but not necessarily, on a geographic basis.

(3) A case assigned to a Regional Board is first handled by a two-man team made up of a renegotiator and an accountant. The accountant develops the financial information; the renegotiator develops information concerning contract performance and any other facts which may be of value in arriving at a determination. The team meets with and discusses the case with the contractor and others. When the team has compiled all the necessary information it prepares

[4] This general description of procedures paraphrases detailed regulations in 32 C.F.R. §§ 1471–1475.

a Report of Renegotiation which consists of Part 1(a) dealing with the accounting aspects, and Part 2 dealing with the renegotiator's evaluation and recommendation.

(4) The team report is then submitted to the Regional Board.

(a) In a Class B case the Regional Board, acting under power delegated to it by the Board, either issues a clearance notice or issues a unilateral order determining excessive profits. In the latter case an appeal by an aggrieved contractor lies to the Board in Washington.

(b) In a Class A case at regional level renegotiators recommend to the Regional Board either that clearance issue or that a refund be ordered. The Regional Board, in turn, makes a report and recommendation and transmits the file and report to the Board in Washington which has reserved to itself the authority to handle Class A cases.

(5) In a Class A case in which a Regional Board has recommended a clearance, the file after reaching Washington is first sent to the Office of Accounting which prepares a memorandum addressed to the Office of Review. In that memorandum the accounting office comments upon the financial report submitted by the regional accountant and indicates whether or not it agrees with the opinion of the accountant at the regional level. The Office of Review in turn assigns a reviewer who indicates his concurrence or disagreement with the recommendation of the Regional Board, and then the Director of the Office of Review indicates his own agreement or disagreement with the Regional Board's conclusions.

The file containing the various staff recommendations is then circulated among the five members of the Board. Any member may, if he wishes, conduct an

independent study. Finally according to Mr. Hartwig, "[W]hen the recommended clearance of the Regional Board comes up on the Board agenda, the Board simply approves or disapproves the clearance. It does not adopt any of the memoranda that are before it." (Tr. at 7)[5]

In the unusual case, however, where the Board has serious questions about the Regional Board's recommendation of clearance, the Board will reassign the case to headquarters and appoint a division of its own members to meet with the contractor and investigate the case further. Once the division is satisfied that a clearance is appropriate, it prepares a report to the Board to this effect. If the Board agrees, it issues a clearance after reassignment notice.

(6) There are two other types of cases which come to Washington after regional consideration, namely (a) a Class B case where a unilateral order determining excessive profits has been issued and the contractor has indicated an appeal, and (b) a Class A case where an excessive profits determination has been recommended by the Regional Office.

In such cases the Board appoints a division of its members to meet with the contractor and prepare a report to the full Board setting forth its analysis and recommendation. The case is then put on the agenda for consideration by the whole Board and ultimately is disposed of by the issuance of a clearance notice or the issuance of a unilateral order of determination of excessive profits. The minutes of the Board do not reflect any discussion or argument—they simply reflect the ultimate disposition of the case.

(7) 50 U.S.C. App. § 1215 provides in part:

> "Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it

[5] Tr. references are to the Hartwig deposition.

> shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor, with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination."

This statutory provision is implemented by 32 C.F.R. 1477.2 and 1477.3.

32 C.F.R. 1477.2 involves the case in which an order has issued, and the language of the regulation simply tracks the language of the statute.

32 C.F.R. 1477.3 governs a case in which an order has not issued and it provides in part:

> "When a Regional Board has made a final determination in a Class B case or a final recommendation in a Class A case, or when the Board has made a final determination, and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board or the Board, as the case may be, will furnish the contractor a written summary of the facts and reasons upon which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement:"
>
> The statement of facts and reasons and summaries of facts and reasons called for by the foregoing are prepared in draft form by the Board's staff and are circulated to each Board member to make whatever changes he wishes before they are finalized. Both are fresh documents in that the various memoranda in the case files are not simply summarized.

It is important to note that in no case does the Board formally adopt reports or recommendations of either the Regional Boards or its staff. It studies and considers but it does not adopt. Mr. Hartwig stated the reasons for this aspect of the Board's procedures:

"As a practical matter, * * * the Board would never get the job done as expeditiously as Congress intended for it to be done, if a Board agreement had to be secured with respect to every report which is submitted to it. Another reason that the Board operates this way is that this is a judgemental type of operation where Board members may disagree with each other respecting the evaluation of a particular statutory factor; but, nevertheless, can agree on the decision. Frequently it happens in Board discussions that one Board member will emphasize one factor more than another. Or, I know of instances where, upon review of a proposed clearance, an individual Board member might criticize the report of renegotiation because it omitted something. He may even question whether the recommendation incorporated in that report is sufficiently supported in the report itself.

"But when he makes an independent examination of the file he may find, for example, a performance report which convinces him that the recommended clearance is appropriate, even though the particular renegotiator may not have commented favorably on the contractor's performance. This will simply illustrate how these cases come before the Board.

"There may be a case where one Board member will consider that the clearances are justified, clearance is justified, in his own mind, because the overall costs are reasonable. Another Board member might not be impressed by that point, he may consider that perhaps the overall costs are not low costs, but simply reasonable costs, but be more impressed by the contribution to the defense effort than his colleague. Nevertheless, despite the differences in evaluation, they can agree on the result." [Tr. at 150–151]

IV.

As noted above, subsequent to the decision of the Court of Appeals, and while this matter was pending before this Court, the Board, under date of February 24, 1971, amended its regulation C.F.R. § 1480.5 to provide as follows:

> "(a) *Records available for inspection.* Pursuant to 5 U.S.C. 552(a)(2), the Board will make available for public inspection and copying, the following records:
>
> (1) Agreements determining excessive profits.
>
> (2) Orders determining excessive profits.
>
> (3) Statements of facts and reasons issued by the Board.
>
> (4) Letters not to proceed.
>
> (5) Clearances after assignment.
>
> (6) Clearances without assignment (express Board Action).
>
> (7) Clearances without assignment (pursuant to delegation of authority).
>
> (8) Decisions on applications for commercial exemption.
>
> (9) Decisions on new durable productive equipment exemption.
>
> (10) Decisions on applications for stock item exemption.
>
> (11) Special accounting agreements.
>
> (12) Interpretations.
>
> (13) General Orders that affect the public.
>
> (14) Administrative Orders that affect the public.
>
> "Without regard to the provisions of 5 U.S.C. Section 552(a)(2), the Board will also make available for public inspection and copying summaries of facts and reasons issued by the Board." 36 Fed.Reg. 3808 (1971). So,
>
> (1) the Court of Appeals having determined that a statement of facts and reasons

is a final order (as amended 32 C.F.R. 1480.5(1)(a)(3) now provides); and

(2) the Board having made available to Grumman certain performance reports and unilateral orders; and

(3) the Board having made provision in 32 C.F.R. 1480.5(1)(a) for the production of summaries of facts and reasons "without regard to the provisions of 5 U.S.C. Sec. 552(a)"

the Board now alleges full compliance with the mandate of the Court of Appeals and the provisions of the Freedom of Information Act.

But Grumman insists that final opinions and orders of the Board embrace at least the following:

"(1) Any 'Statement of Facts and Reasons' prepared pursuant to 32 C.F.R. § 1477.2 and Section 105(a) of the Renegotiation Act of 1951 (50 U.S.C. App. § 1215 (a)).

"(2) Any 'Summary of Facts and Reasons' prepared pursuant ot 32 C.F.R. § 1477.3 when no 'Statement of Facts and Reasons' was subsequently furnished.

"(3) Any report and 'recommendation' prepared by a division of The Renegotiation Board pursuant to 32 C.F.R. § 1472.4 (d) which does not result in a clearance and when no 'Statement of Facts and Reasons' or 'Summary of Facts and Reasons' was subsequently furnished.

"(4) Any 'report' prepared by a Regional Board pursuant to 32 C.F.R. § 1473.3 (a) which results in a clearance.

"(5) Any report and 'recommendation' prepared by a division of The Renegotiation Board pursuant to 32 C.F.R. § 1472.4 (d) which results in a clearance.

"(6) Any concurring or dissenting document prepared with respect to (1) through (5) above."

V.

We discuss each of the Grumman claims below.

(1) *Statement of Facts and Reasons*

The Court of Appeals specifically declared that such documents were final opinions of the Board and subject to disclosure under the Freedom of Information Act. *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board, supra,* 425 F.2d at 579 n. 2. Accordingly, we need not discuss it further.

(2) *Summary of Facts and Reasons*

A summary of facts and reasons is furnished when a final determination of excessive profits has been made by the Board (or a Regional Board) and the contractor is unable to decide whether to enter into agreement for a refund. If the contractor refuses to enter into such an agreement a unilateral order determining excessive profits is issued.

In its amended regulation 32 C.F.R. 1480.5 (*supra*) the Board made these summaries available to the public without, however, conceding the compulsion of the Freedom of Information Act. The Board takes the position that the unilateral orders issued in the pertinent cases, and not summaries of facts and reasons furnished pursuant to 32 C.F.R. 1477.3, are the final opinions and orders of the Board.

It is to be noted that 32 C.F.R. § 1477.3 used the word "final" in at least four places in describing the procedures for providing the contractor with a summary of facts and reasons, i.e.

> "When a Regional Board has made a *final* determination in a Class B case or a *final* recommendation in a Class A case, or when the Board has made a *final* determination, * * *. the Regional Board or the Board * * *. will furnish the contractor a written summary of the facts and reasons upon which such *final*

> determination or recommendation is based * * *" [emphasis supplied]

Further, it is to be noted that 32 C.F.R. 1477.4 which enumerates the items to be included "in every statement or summary furnished" makes no distinction between the two types of documents. It follows that if statements of facts and reasons are final opinions (and the Court of Appeals has so held) then clearly summaries of facts and reasons are also final opinions. To claim otherwise would fly in the face of the language of the regulations and the practical effect of the documents.

Chairman Hartwig said that the summary of facts and reasons "constitutes the Board's exposition of the case" but he maintained that it was not a final exposition because it was subject to change. (Tr. at 110) The Chairman's position, however, is unrealistic. Changes occur only in a "small minority of cases" (Tr. at 182) and in those the changed summary would logically become the final opinion.

Clearly a summary of facts and reasons expresses the Board's conclusions as to why and in what manner the contractor realized excessive profits. A unilateral order without a summary of facts and reasons would be meaningless and useless. It would tell nothing to a contractor and the public.

[1] Accordingly, the Court holds that a summary of facts and reasons is a final opinion of the Board and available to the public under the Freedom of Information Act without reservation in all cases in which neither a statement of facts and reasons nor a modified summary is subsequently issued. In those few cases where the summary of facts and reasons is changed, the modified summary constitutes the final opinion of the Board and must be made available to the public.

(3) *Division Report and Recommendation—Excessive Profits Determination*

Once a Regional Board has recommended a determination of excessive profits in a Class A case, the Board designates a division of its members to consider the case. After studying the various memoranda, the division files with the whole Board its report and recommendation which includes a consideration of the statutory factors laid out in 32 C.F.R. § 1460.9–1469.-14. 32 C.F.R. § 1472.4(d).

If one of the division's members disagrees with the report and recommendation he may file a dissenting memorandum. The report and recommendation, as well as the dissent, is then discussed by the full Board and if the Board agrees with the division a unilateral order of excessive profits is issued.

During his deposition Chairman Hartwig, in discussing this type of case, claimed that only the recommendation of the division but not its report was approved by the Board and that each member had his own reasons for the final action taken by the full Board, i.e., he claims the unilateral order is the Board's final exposition.

However, it appears to the Court that in this type of case the division report rather than the unilateral order is the crucial and final document. The report contains a consideration of the statutory factors, explains the reasons for the division's recommendation, and gives the facts on which that reasoning rests. This is the essence of a final opinion.

It is unrealistic to claim that because Board members might have different reasons for approval of the division's recommendation, the report of the division upon which its recommendation is based is not a final opinion. It is in fact the last document which explains reasons for the Board's decision. The report often re-

flects the views of a majority of the five Board members. But at the very least it reflects the analysis of one member and would thereby constitute a concurring opinion which under the Freedom of Information Act is included within the term final opinion.[6] If Board members have differing rationale for approval of the division's recommendation, they may state it in concurring opinions or memoranda.

[2] Accordingly, the Court concludes that where neither a statement of facts and reasons nor a summary of facts and reasons is issued, the report and recommendation of the division of the Board, together with any dissenting or concurring memoranda, constitutes the Board's final opinion and is available to the public under the Freedom of Information Act.

(4) *Clearance—Report of Regional Board*

When a case assigned to the Regional Board has been investigated and the Regional Board has submitted its report to the Board recommending clearance, the Board after considering all the information in the file either approves or disapproves. If it approves the recommendation the clearance notice is issued by the Regional Board.

This clearance is a decision of the Regional Board in a Class A case unless the Board is not in accord. The clearance notice is signed and issued by the Chairman of the Regional Board and states:

> "This determination has been made by this Regional Board pursuant to the due delegation

[6] The Freedom of Information Act specifically included "dissenting and concurring opinions" under its definition of "final opinion" so that "if one or more agency members dissent or concur, the public and the parties" will "have access to these views and ideas." S.Rep.No. 813, 89th Cong., 1st Sess. 7 (1965).

> of authority and The Renegotiation Board has advised the Regional Board that it is in accord with this determination." 32 C.F.R. § 1498.6(a).

The notice further states that it

> "shall constitute *final* action by the Government with respect to renegotiation pursuant to the Act for the fiscal year under review." [emphasis supplied] 32 C.F.R. § 1498.6(a).

Regional Board reports apply the statutory factors outlined in 32 C.F.R. §§ 1460.9–1460.14, are prepared and signed by a Regional Board member, and are signed on behalf of the Regional Board by its Chairman.

Such a report gives the facts and reasons for the Regional Board's recommendation and it is that recommendation which is approved by the Board. Here again a clearance notice by itself is meaningless. In order for the public to be fully informed, the reasons behind the clearance notice must be made available and in this type of case such facts and reasons are found in the Regional Board's report.

[3] Accordingly, the Court concludes that a Regional Board report which results in a clearance notice constitutes the final opinion of the Board in a clearance case of this nature and must be made available to the public under the Freedom of Information Act.

(5) *Clearance—Division Report and Recommendation*

When the Board has reassigned a case to headquarters because it questions the Regional Board's recommendation for clearance, the Board appoints a division of its members to investigate the case and prepare a report for the Board. If the report recommends clearance and the Board agrees that it is appropriate, a clearance after reassignment notice is issued by the Board.

This procedure is similar to a determination by the Board that excessive profits have been realized. The reasoning of the Court applied to that situation, *supra*, applies equally well in this instance. The division report is prepared by a member of the Board. It is the final Board document which lays out reasons for the Board's actions.

It usually represents the reasons why at least a majority of the Board decided clearance should issue. If not specifically adopted by a majority of the Board, it at least represents one member's analysis of the issues and reasons for deciding that a clearance notice should issue and would be a concurring opinion.

[4] Accordingly, the Court holds that a report and recommendation of a division which results in a clearance after reassignment notice constitutes a final opinion within the meaning of the Freedom of Information Act and must be made available to the public.

VI.

[5] To recapitulate, what the Court considers a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto. Depending on the circumstances of any given case that document may be a summary of facts and reasons when no subsequent statement of facts and reasons is prepared; or it may be a report and recommendation of a division which does not result in a clearance and when neither a statement of facts and reasons, nor a summary of facts and reasons is prepared, or it may be the report of a Regional Board which results in a clearance, or it may be the report and recommendation of a division which results in a clearance. The essential factor is whether or not it represents

the final conclusion and reasoning on which the final determination of the Board is based.

VII.

There is a statutory exemption in the Freedom of Information Act which protects trade secrets and commercial or financial information obtained from a person which is privileged or confidential.[7] The Court of Appeals in *Grumman* v. *Renegotiation Board*, *supra*, at 581, discussed this exemption and noted that final orders and opinions should only be made available after confidential detail has been deleted. The holding of this Court as to what constitutes final opinions and orders in this particular instance must, of course, be read in the light of that statutory exemption.

VIII.

Collateral to the issues in this case the Court's attention has been called to the fact that when the Board does make information public it does so through an indexing system which makes it extremely difficult for the public to locate and identify desired information. This Court does not claim any expertise in the matter of indexing, but it does suggest that in connection with information required to be made available, the Board should use its best efforts to make the information easily available through a simplified indexing system.[8]

Counsel for plaintiff will submit an appropriate order within ten days.

---

[7] 5 U.S.C. § 552(b)(4) (Supp. IV, 1969).

[8] Counsel for Grumman suggested the Standard Industrial Classification Code which the Board used previously in making information available to Congress.

APPENDIX D

The provisions of the Freedom of Information Act, as amended (5 U.S.C. 552) are as follows:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to,

or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance, with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

U.S. GOVERNMENT PRINTING OFFICE: 1974